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SUBJECT: MALAWI INVESTMENT CLIMATE STATEMENT, 2005

REF: SECSTATE 25036

Investment Climate Statement - Malawi 2005

1. Openness to Foreign Investment

1A. The Government encourages both domestic and foreign investment in most sectors of the economy, without restrictions on ownership, size of investment, source of funds, and destination of final product. The Competition And Fair Trading Act -- passed by Parliament in November 1998 but made operational in April 2000 -- aims to regulate and monitor monopolies and the concentration of economic power, protect consumer welfare, and strengthen the efficient production and distribution of goods and services. The Act calls for the formation of a commission that will approve only those acquisitions, mergers or takeovers that increase employment and net exports, and lower prices for consumers. During the first half of 2000 the U.S.-based FCA Investment Company, together with the two local companies, acquired about 63% shares in the National Insurance Company of Malawi (NICO) through a cash takeover. Ministry of Trade and Private Sector Development is in the process of appointing competition Commissioners who will later set up a secretariat to oversee implementation of the Competition and

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Fair Trading Act.

1B. There is no government screening of foreign investment in Malawi. Apart from the privatization program, the Government's overall economic and industrial policy does not have discriminatory effects on foreign investors. Since industrial licensing in Malawi applies to both domestic and foreign investment, and is only restricted to a short list of products, it does not impede investment, limit competition, protect domestic interests, or discriminate against foreign investors at any stage of investment. Restrictions are based on environmental, health, and national security concerns. Affected items are firearms; ammunition, chemical and biological weapons; explosives; and manufacturing involving hazardous waste treatment/disposal or radioactive material. All regulations affecting trade (foreign exchange, taxes, etc.) apply equally to domestic and foreign investors.

1C. As of December 2004, Malawi had privatized 61 units of approximately 110 state-owned enterprises targeted for privatization, generating about MK 1.0 billion (about USD 9.2 million). All investors, irrespective of ethnic group or source of capital (foreign or local) may participate in the privatization program. However, the Malawi Stock Exchange regulations limit participation of an individual foreign portfolio investor to a maximum of 10% of any class or category of security under the program; and limit maximum total foreign investment in any portfolio to 49%. The Privatization Act also prohibits members of the Cabinet, or employees of the Privatization Commission or its consultants, to participate in any divestiture except where an offer is made to the general public. Malawian nationals are offered preferential treatment, including discounted share prices and subsidized credit. Since July 2000, the maximum subsidized credit amount has been increased from 20,000 Malawi Kwacha (MK) (about 184 USD) to MK 50,000 (about 459 USD) and the minimum income threshold of MK 10,000 per month (about 92 USD) was removed. Subsidized credit carries a precondition that the shares or assets be retained for at least two years.

2. Conversion and Transfer Policies

1A. There are no restrictions on remittance of foreign investment funds (including capital, profits, loan repayments and lease repayments) as long as the capital and loans were obtained from foreign sources and registered with the Reserve Bank of Malawi (RBM). The terms and conditions of international loans, management contracts, licensing and royalty arrangements, and similar transfers require initial RBM approval. The RBM grants approval according to prevailing international standards; subsequent remittances do not require further approval. All commercial banks are

authorized by the RBM to approve remittances, and approvals are fairly automatic as long as the applicant's accounts have been audited and sufficient foreign exchange is available. Businesspeople report no major problems with foreign currency remittances. Traditionally, foreign exchange availability follows the agricultural cycle in Malawi. It is plentiful from April through September (when tobacco sales generate foreign exchange inflows), and scarce from October through March. During periods of scarcity, investors may not have immediate access to foreign exchange. As of December 2004, official foreign reserves equaled approximately 2.0 months of import cover. Non official reserves totaled 1.2 months of import cover.

13. Expropriation and Compensation

1A. Malawi's constitution prohibits deprivation of an individual's property without due compensation. There are effective laws that protect both local and foreign investment. The likelihood of expropriatory actions has been extremely remote since the repeal of the forfeiture act in 1992. Although public tenders for the sale of shares of state-owned enterprises often encourage local participation, foreign investors tend to dominate the share-holding of large MSE-listed companies requiring significant technical and financial resources.

1B. The Land Reform Commission -- which the Government established in 1996 to review land tenure and establish a new land reform program -- presented its final report to the President in November 1999. In January 2002, the Ministry of Lands published a new land policy. Draft legislation is being prepared, and the new law will likely incorporate many recommendations of the Commission's report, including the abolition of freehold tenure (owners holding permanent title) and the conversion of all freehold titles to leasehold (owners holding land on lease for a maximum period of 99 years.) As of July 2000, the Malawi Government stopped issuing freehold land.

1C. At present, the Government may employ land acquisition procedures set forth in the Land Acquisition Act of 1971. According to this Act, the government must justify its acquisition as being in the public interest and must pay fair market value for the land. Fair market value is assessed by summing the amount the owner originally paid for the land, the value of any permanent improvements that increase the productive capacity, utility or amenity of the land, and any appreciation of the land value. If the private landowner objects to the level of compensation, he may obtain an independent assessment of the land value. According to the Act, however, such cases may not be challenged in court; the Ministry of Lands, Housing, Physical Planning, and Surveys remains the final judge. Most land in Malawi is leasehold.

14. Dispute Settlement

1A. Malawi has an independent but overburdened judiciary, which derives its procedures from English Common Law. There has been little government interference in the court system, although there have on occasion been allegations of government involvement -- largely through public comments made by politicians on certain cases. There are also frequent allegations of bribery in civil and criminal cases. Administration of the courts is weak, and due process can be very slow. Serious shortcomings in the judicial system include poor record keeping, a lack of attorneys and trained personnel, heavy caseloads, and insufficient financial resources.

1B. The court system in Malawi accepts and enforces foreign court judgments that are registered in accordance with established legal procedure. There are, however, reciprocal agreements among Commonwealth countries to enforce judgments without this registration obligation. There is no such agreement between Malawi and the United States.

1C. Malawi has legislation that offers adequate protection for property and contractual rights. Malawi has written commercial laws, which codify Common Law. The Sale-Of-Goods Act, the Hire-Purchase Act, and the Competition and Fair Trading Act cover commercial practices. The first two Acts have been consistently applied, and there is a track record of cases involving commercial law. There is also a written and consistently applied Bankruptcy Law based on Common Law. Under Bankruptcy Law, secured creditors -- rank-ordered based upon investment registration dates -- have first priority in recovering money. Monetary judgments are usually made in the investor's currency. However, the immediate availability of foreign exchange is dependent upon supply, which varies on a seasonal basis.

1D. Malawi is a member of the International Center for Settlement of Investment Disputes (ICSID), and accepts binding international arbitration of investment disputes between foreign investors and the state if specified in a written contract. There have been no investment disputes

involving U.S. Companies since 1996.

15. Performance Requirements/Incentives

1A. Malawi is not in compliance with WTO Trade Related Investment Measures (TRIM) notification requirements. However, Malawi does not set performance requirements for establishing, maintaining or expanding an investment. Nor does it place requirements on ownership, source of financing, or geographic location. The Government accords export promotion zone (EPZ) status only to firms (foreign or domestic) that produce exclusively for export.

1B. Malawi offers the following incentives, which apply equally to domestic and foreign investors:

- a corporate tax rate of 35%
- the following tax allowances:
 - 40% for new buildings and machinery
 - up to 20% for used buildings and machinery
 - 100% deduction for manufacturing company operating expenses in 2 years prior to start of business
 - no withholding tax on dividends;
 - no import duty on raw materials for manufacturing industry (N.B. This policy is being implemented at the discretion of the Customs and Excise Department. Several manufacturers have recently complained of delays and denial of this incentive.)
 - no import duty on computer equipment and accessories
 - tax holidays or reduced corporate tax for some new investments
 - a maximum import tariff rate of 25%

1C. Malawi offers the following special incentives for exporters:

- for exporters in EPZs:
 - no corporate tax, value added tax, or withholding tax on dividends
 - no import duty on capital equipment and raw materials; and
 - no excise taxes on local purchases of raw materials and packaging
- for industries manufacturing in bond:
 - an allowance of 12% of export revenues for products other than tobacco, tea, sugar and coffee
 - transport allowance of 25% of all international transport costs
 - no import duties on capital equipment
 - no import duties or surtaxes on raw materials
 - no excise tax on local purchases of raw materials and packaging material

1D. The above incentives are applied consistently. Foreign investors are generally accorded national treatment. U.S. and other foreign firms are able to participate in government/donor-financed and/or subsidized-research and development programs. The following information is required to register and incorporate a company: name of the company, authorized share capital, registered office, location of books of accounts, address of the company secretary, and names of directors and shareholders.

1E. Visas do not inhibit investors, but the need for employment permits sometimes can. Expatriate employees (of both domestic and foreign businesses) who reside and work in Malawi must obtain temporary employment permits (TEPs).

1F. The government issued a revised "Policy Statement and New Guidelines for The Issuance and Renewal of [Expatriate] Employment Permits" (one document) in November 1998. The guidelines state that investors may employ expatriate personnel in areas where there is a shortage of "suitable and qualified" Malawians. They underscored the government's desire to make TEPs readily available to expatriates, and mandated that processing times for TEP applications shall not exceed 40 working days. The 1998 policy provides for two types of TEPs:

- those for "key posts" (defined as positions of "strategic importance" in business operations) which are granted for the life-span of the organization; and;
- those for "time posts" (defined as positions with contracts of three-year duration or less) which are granted for three-year periods and renewable once.

1G. The government issues Business Residence Permits (BRPs) to foreign nationals who own/operate businesses in Malawi. BRPs are issued for five-year periods and are renewable. Permanent Residence Permits (PRPs) are issued to foreign spouses who reside permanently in Malawi, and to owners/operators of businesses who reside in Malawi for periods in excess of ten years. PRP holders cannot work as employees. Malawi's immigration laws governing BRPs and PRPs have been revised. There are three categories of

residence permits based on amount of investment, status of applicant (investor, retiree, student, spouse of a Malawi citizen) and period of business assignment. The maximum number of resident permits per organization is five, with the actual number allowed dependent on the amount of investment.

16. Right to Private Ownership and Establishment

The government encourages both domestic and foreign investors to establish and own business enterprises in most sectors of the economy. All investors have the right to establish, acquire, and dispose of interests in business enterprises. Public enterprises compete equally with private entities with respect to access to markets, credit and other business operations.

17. Protection of Property Rights

1A. Both foreign and domestic investors have access to Malawi's legal system, which functions fairly well, albeit slowly. Malawi has laws that govern the acquisition, disposition, recording and protection of all property rights (land, buildings, etc.) as well as intellectual property rights (copyrights, patents and trademarks, etc.). The government has signed and adheres to bilateral and multilateral investment guarantee treaties and key agreements on intellectual property rights. Malawi is a member of the convention establishing the multilateral investment guarantee agency, the World Intellectual Property Organization (WIPO), the Berne Convention, and the Universal Copyright Convention.

1B. The Copyright Society of Malawi (COSOMA), established in 1992, administers the 1989 Copyright Act, which protects copyrights and "neighboring" rights in Malawi. The Registrar General administers the Patent and Trademarks Act, which protects industrial intellectual property rights in Malawi. A public registry of patents and patent licenses is kept. Patents must be registered through an agent. Trademarks are registered publicly following advertisement and a period of no objection. WTO rules allow Malawi, as a less developed country, to delay full implementation of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement until 2016. The Ministry of Commerce and Industry (MCI) -- coordinator of WTO issues in Malawi -- has limited capacity to effectively track WTO developments. The MCI is working with COSOMA and the Registrar General to align relevant domestic legislation with the WTO TRIPs agreement with technical assistance from the Africa Regional Intellectual Property Organization (ARIPO).

18. Transparency of the Regulatory System

1A. Malawi's industrial and trade reform program -- including rationalization of the tax system, liberalization of the foreign exchange regime, and elimination of trade and industrial licenses on several items and businesses -- has produced written guidelines intended to increase government use of transparent and effective policies to foster competition. No tax, labor, environment, health and safety or other laws distort or impede investment. However, procedural delays, red tape, and corrupt practices continue to impede the business and investment approval process. These include decision making, which is often neither transparent nor based purely on merit, and required land-access approvals. While market prices for goods are generally not controlled, prices of certain other goods -- sugar, maize, petroleum products, and state-provided utilities -- are regulated.

1B. There have been positive steps towards increasing regulatory transparency and improving the foreign investment environment. These developments include: establishment of the National Electricity Council in October 1998; the establishment of the Malawi Communication Regulatory Authority (MACRA) in May 1999; the licensing and operation of a second cellular phone service provider in 1999; and the splitting of the former Malawi Posts and Telecommunication Corporation (MPTC) into the Malawi Posts Corporation (MPC) and Malawi Telecommunications Limited (MTL) as separate entities in May 2000. The state-owned Petroleum Control Commission (PCC) relinquished its monopoly on petroleum imports in May 2000, allowing the private sector to import 80% of Malawi's fuel. PCC now has a largely regulatory function within the petroleum sector.

19. Efficient Capital Markets and Portfolio Investment

1A. The Reserve Bank of Malawi pursues a tight monetary policy, though a legacy of fiscal indiscipline continues to exert pressure on money supply. In 2001, growth in money supply (m2) was 21.2%. M2 growth was 25.2% in 2002 and 29.3% in 2003. The new government elected in May 2004 has embarked on a program of expenditure control and reduction in new domestic borrowing.

1B. With the tighter monetary policy, headline inflation

dropped from 33.7% in January 2001 to 9% in May 2003. It has since crept up again, and was at 12% in October 2004. Reserve Bank discount rates were reduced from 35% to 25% in 2004. However, excessive government spending has continued to put inflationary pressure on the economy. As of end November 2004, the kwacha was trading at approximately 109 to the dollar.

1C. The private sector in Malawi has a variety of credit instruments. Credit is generally allocated on market terms. Foreign investors may utilize domestic credit, but proceeds from investments made using local resources are not remittable.

1D. Malawi has a sound banking sector, overseen and well regulated by the Reserve Bank of Malawi -- its central bank. There are six full-service commercial banks: First Merchant Bank Limited; Finance Bank of Malawi; Indefinance; National Bank of Malawi (NBM); Nedbank; Stanbic Bank (SB) and Loita Investment Bank. Other financial institutions are: Investment and Development Bank of Malawi (INDEBANK); Investment and Development Fund of Malawi (INDEFUND); the Malawi Development Corporation (MDC); Finance Corporation of Malawi (Fincom); Leasing and Finance Company of Malawi (LFC); Malawi Savings Bank (MSB); the New Building Society (NBS); the NBS Bank; the Malawi Rural Finance Company (MRFC), Continental Discount House, and First Discount House.

1E. NBM and SB, which operate on a commercial, for-profit basis, have dominated Malawi's commercial banking sector for the past 30 years. As of December 2003, these banks controlled over 80% of the market. Market shares for the remaining banks were as follows: FMB, 6.4%; FBM, 3.8%; and Indefinance, 2.2%.

1F. The structure of the Malawi banking sector changed significantly in 2001 with the privatization of the Stanbic Bank (SB). Standard Bank of South Africa completed its purchase of 60% of SB in December 2001 as part of the privatization program. The conglomerate Press Corporation Limited (PCL), in which the government holds a 49% stake, sold out of SB but increased its holdings in rival National Bank of Malawi (NBM). PCL now owns 50.1% of NBM.

1G. The Companies Act, the Capital Market Development Act (1990), and the Capital Market Development Regulations (1992) provide the legislative and regulatory framework for the encouragement and facilitation of portfolio investment in Malawi. The attendant legal, regulatory and accounting systems are transparent and consistent with international norms. These acts govern the Malawi Stock Exchange (MSE).

1H. Stockbrokers Malawi Limited (SML) is the major registered stockbroker in Malawi. SML ran the MSE under a three-year contract with the RBM until April 1, 2000, when the two split to assume separate roles of broker and regulator, respectively. Two new brokerage firms, Continental Discount House and First Discount House, began operations in 2001 and 2002, respectively. The MSE remains regulated by the Stock Exchange Commission.

1I. SML runs a secondary market in government securities, and both local and foreign investors have equal access to the purchase of these securities. The following nine companies are listed on the MSE: NICO, Blantyre Hotels Limited (BHL), Sugar Corporation of Malawi (SUCOMA), Stanbic Bank (Malawi) Packaging Industries of Malawi (PIM), Press Corporation Limited (PCL), Old Mutual, Sunbird and National Bank of Malawi (NBM). As at December 17, 2004, 6.716 billion shares were in issue on the MSE, and the market capitalization was MK 745.186 billion (USD 6.84 billion). Other potential companies for listing on the SME include Bata Shoe Company, Leopard Match Company Limited, Malawi Insurance Brokers Limited, Manica Freight Services Limited and Bain Hogg Insurance Limited. Malawi and other SADC markets are taking steps to harmonize listing requirements through the SADC stock exchange co-operation initiative.

1J. The MSE's development is still in its nascent stage, and hostile takeovers have not yet occurred. Apart from the restrictions under the privatization program, the U.S. Embassy in Malawi is not aware of any specific measures taken by private firms to restrict foreign investment or participation. Foreign investors tend to be the dominant shareholders in large MSE-listed companies requiring significant technical and financial resources. The Competition and Fair Trading Act will not cover the day-to-day trading on the MSE, but will regulate mergers, acquisitions, and takeovers that are of national interest.

110. Political Violence

1A. Malawi has been largely free of political violence since gaining independence in 1964. Apart from the disarming of the paramilitary group, the Malawi Young Pioneers, incidents

of violence associated with Malawi's 1994 transition to democracy were few. Sporadic incidents of violence occurred at political rallies in late 1998. The 1999 presidential and parliamentary election campaigns were largely free of political violence, but there were limited incidents of post-election violence (primarily small-scale property damage) in June 1999 and in by-elections in Blantyre in June 2001. Sporadic violence in the run-up to the 2004 elections, and in the days immediately following the elections, also occurred.

B. Incidents of labor unrest occasionally occur, but these are usually tame affairs. There are, however, no nascent insurrections, belligerent neighbors, or other politically motivated activities of major concern to investors.

11. Corruption

A. There are serious incidences/allegations of corruption, particularly in the area of customs and excise tax and government procurement. The Corrupt Practices Act, revised in 2004, provides the legal framework for combating corruption in Malawi.

B. The Anti-Corruption Bureau (ACB) is legally mandated to investigate corruption in Malawi. Opened in 1997 and fully staffed in 1998, the ACB has thus far brought forward a number of high-level cases involving former cabinet-level officials and senior members of the ruling party, among others. During the presidency of Bakili Muluzi, the ACB had difficulties getting cases prosecuted through the politically appointed Director of Public Prosecutions; these difficulties have in large part disappeared since the election of President Bingu wa Mutharika in May 2004. The new administration has brought a change of leadership to the ACB and prioritized the prosecution of corrupt practices.

C. Malawi subscribes to the provisions of the OECD Convention on Combating Bribery, but is not a signatory to the Convention. Malawi's Penal Code prohibits bribery. Giving or receiving a bribe -- whether to or from a Malawian or foreign official -- is a crime under section 90 of Malawi's penal code. Accordingly, bribes are not tax deductible.

12. Bilateral Investment Agreements

A. Malawi's policy is to negotiate bilateral investment treaties with countries whose nationals opt to invest in Malawi. The United States-Malawi Double Taxation Agreement from the colonial period was canceled by the United States in 1983. To date, there is neither a bilateral investment nor a taxation treaty. There have been no taxation issues of concern to U.S. investors since 1996.

B. Malawi acceded to the Multilateral Investment Guarantee Agency (MIGA) in 1985/86. Since MIGA provides mechanisms for the settlement of investment disputes, Malawi has not renewed several investment treaties that lapsed after 1986. However, the United Kingdom, the Netherlands, Denmark, South Africa, Norway, Sweden and Switzerland still maintain Double Taxation Treaties with Malawi.

13. OPIC and Other Insurance Programs

Malawi has had an OPIC investment guarantee agreement since 1967. In August 1999 the U.S. Export-Import Bank included Malawi under its new Africa Short-term Export Credit Insurance Program.

14. Labor

A. The Government of Malawi estimates that more than half of the population is of working age. Unskilled labor is plentiful; skilled labor is scarce. Occupational categories with skills shortages include accountants and related personnel; economists; engineers; primary and secondary school teachers; lawyers; and medical and health personnel. The University of Malawi provides bachelors and masters degrees in economics, engineering, medicine, education, agriculture and administration. The Malawi College of Accountancy teaches accounting. Chancellor College operates the country's law school. In early 1999, the government established the Technical, Entrepreneurial and Vocational Education and Training (TEVET) program to address technical skills shortages in industry.

B. The Labor Relations Act (LRA) governs labor-relations management in Malawi. It was signed into law in June 1996, and entered into force on December 1, 1997. The Act allows strikes and lockouts for registered workers and employers after dispute settlement procedures in collective agreements and conciliation have failed. As democracy and trade union rights have existed only since 1994, industrial relations are still evolving. Employers, labor unions, and government generally lack sufficient knowledge of their legitimate roles in labor relations/disputes.

1C. Workers have the legal right to form and join trade unions. As of November 2003, 26 unions were registered. Union membership is low, however, given the small percentage of the work force in the formal sector (about 12%), the lack of awareness of worker rights and benefits, and a resistance on the part of many employees to join unions. Only 13% of people employed in the formal sector belong to unions. Unions may form or join federations, and have the right to affiliate with and participate in the affairs of international workers' organizations. While the government is a signatory to the ILO Convention protecting worker rights, mechanisms for enforcing the provisions of the convention are weak. There are serious manpower shortages at the Ministry of Labor, resulting in almost no labor-standards inspections.

15. Foreign Trade Zones/Free Ports

Legislation for the establishment of export promotion zones (EPZs) came into force in December 1995. All companies engaged exclusively in manufacture for export may apply for EPZ status. As of November 2004, Malawi had approved 21 firms for EPZ status, of which 17 were operational and four had closed operations. A manufacturing under bond (MUB) scheme offers slightly less attractive incentives to companies that export some, but not all, of their manufactures.

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